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Boardroom Confidentiality

The Hewlett-Packard situation prompts a review of boardroom confidentiality, the role of directors outside of the boardroom, and what to do about leaks from the boardroom.

First, the basic premises: A board should function as a collegial body, and directors should respect the confidentiality of all discussions that take place in the boardroom. Confidentiality is essential for an effective board process and for the protection of the corporation and its stockholders. Moreover, directors generally owe a broad legal duty of confidentiality to the corporation with respect to information they learn about the corporation in the course of their duties. Maintaining confidentiality is also essential for the protection of the individual directors, since directors can be responsible for any misleading statements that are attributable to them. A leak of market sensitive information can be a civil and criminal violation of the securities laws and cause an investigation by the SEC or the U.S. Attorney. Even when a director believes the subject matter of his or her statements is within the public domain, it is good practice for individual directors to avoid commenting on matters concerning the corporation. A director who receives an inquiry with respect to the corporation from outside the corporation may or may not have all of the relevant information and his or her response could involve the corporation, as well as the director, in a disclosure violation. Directors also should respect the role of the CEO as the chief spokesperson for the corporation. They should generally not engage in discussions with outsiders concerning corporate business unless specifically requested to do so by the CEO or the board. Where it is necessary for outside directors to speak on behalf of themselves or the corporation, here too it is best for one member of the board to be designated as the board's spokesperson. Where a board has a non-executive chairman or a lead director, under certain circumstances it may also be appropriate for the chairman or lead director to speak on behalf of the corporation, particularly within the ambit of those directors' special roles. In the ordinary course, all such matters should be handled in close consultation with the CEO so as to avoid confusion in the corporation's public statements and posture.

Second, how do you deal with leaks: (1) Reiterate the basic premises. (2) If it is apparent that a particular director has been revealing confidential information, that director should be spoken to by the full board or a committee of the board and advised that the penalty for breaching confidentiality is not being renominated to the board. (3) If it is not apparent who has revealed confidential information, the problem should be discussed by the full board with counsel present and the full board should decide on how to deal with the problem. In most cases this has proved to be effective. In a rare instance where it is not effective, an agreement by all the directors that each will agree to being interviewed by counsel should prove to be effective. Obviously, anything beyond this carries the potential of a Hewlett-Packard type scandal.

Martin Lipton